FILE COPY

FILED
APR 28 1948
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1947

No. 769

IN THE MATTER

of

KINGS COUNTY LIGHTING COMPANY

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

FRANK C. BOWERS,
Solicitor for Petitioner, Public Service Commission of the State of New York.

Dated, April 23, 1948.

348 Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

CONTENTS OF PETITION.

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Summary Statement of Facts	2
Questions Presented	7
Reasons Relied on For Allowance of the Writ	7
Prayer	8

CONTENTS OF BRIEF.

PAGE

APPLICABLE SECTIONS OF THE FEDERAL STATUTE..... 10

APPLICABLE SECTIONS OF THE LAWS OF THE STATE OF NEW YORK 12

THE PRINCIPAL ISSUE IN THIS CASE..... 14

ARGUMENT:

POINT I—The statutes of the State of New York require the approval of PSC to the plan. Unless there is irreconcilable conflict between the Federal and State statutory schemes in respect to this case, the plan may not be enforced without PSC approval..... 15

POINT II—There is no irreconcilable conflict between the Federal and State statutory schemes under the circumstances of this case..... 17

A. The plan itself requires the approval of PSC 17

B. The Act requires that approval of the local regulatory Commission be obtained with respect to the recapitalization of, and issuance of securities by, an intrastate operating company 19

C. In any event, there is no irreconcilable conflict between the Federal and State statutory schemes which would warrant the conclusion that the State requirements had been superseded by paramount Federal law 22

POINT III—If there is conflict between the Federal and State statutory schemes, the Federal Act is unconstitutional as applied to this case.... 24

POINT IV—The provisions of the plan are neither fair and equitable nor feasible..... 25

CONCLUSION 26

Table of Citations.

Cases: PAGE

Hopkins Savings Association v. *Cleary*, 296 U. S. 315 25

In re Electric Bond & Share Co., 73 Supp. 426..... 18

In re Laclede Gas Light Co., 57 F., Supp. 997, Aff'd. *Subnom. Massachusetts Mutual Life Ins. Co.* v. *SEC*, 151 F. 2d 424, Cert. den. 327 U. S. 795 18

In re New England Public Service Co., 72 F. Supp. 452 18

Matter of Rochester Gas & Electric Corp. v. *Maltbie*, 258 App. Div. 682 Aff'd. 284 N. Y. 686..... 15

Matter of Staten Island Edison Corp. v. *Public Service Commission*, 263 N. Y. 209..... 16

North Carolina v. *United States*, 325 U. S. 507..... 24

Smyth v. *Asphalt Belt R. Co.*, 292 Fed. 876..... 24

Texas v. *Eastern Texas R. R. Co.*, 258 U. S. 204..... 24

Statutes:

New York Stock Corporation Law:

§26-a 12, 16, 20

§38-(1) 13, 15, 20

New York State Public Service Law:

§69 ..... 13, 15, 16, 20

Public Utility Holding Company Act of 1945, 49 Stat. 803, 15 USC §79:

§1 19

§6a 10

§7g 10, 19, 20, 21, 22

§11 ..... 9, 20, 21, 24

§11(b) (2) 11

§11(e) 11, 17, 21, 22

Securities & Exchange Commission releases:

In re Columbia Gas & Electric Corp. Release 6840 20

Matter of Derby Gas & Electric Corp. 9 SEC 686 20

Matter of Jacksonville Gas Co. 11 SEC 449..... 20

Puget Sound Light & Power Co. 13 SEC 225..... 20

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

IN THE MATTER

of

KINGS COUNTY LIGHTING COMPANY.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Public Service Commission of the State of New York respectfully prays that a writ of certiorari issue to review the decision and judgment of the Circuit Court of Appeals for the Second Circuit rendered in this case on March 5, 1948. The judgment of the Circuit Court of Appeals affirmed an order of the United States District Court for the Eastern District of New York approving,

confirming and enforcing a plan of reorganization of the Kings County Lighting Company, submitted under Section 11(e) of the Public Utility Holding Company Act of 1935.

Opinions Below.

The opinion of the District Court dated July 3, 1947 (72 F. Supp. 767), is printed in the Record at page 288. The opinion of the Circuit Court of Appeals for the Second Circuit dated March 5, 1948 (unreported), is attached to the printed Record as an addition (Record, p. 393).

A certified transcript of the Record before the Circuit Court of Appeals and the proceedings in said Court, is presented herewith in accordance with Rule 38 of this Court.

Jurisdiction.

This application is made under Section 240(a) of the Judicial Code as amended (28 U. S. C. A., §347).

The jurisdiction of this Court is invoked under Section 25 of the Public Utility Holding Company Act (15 U. S. C. A. §79y).

Statutes Involved.

Public Utility Holding Company Act of 1935, 49 Stat. 838 (15 U. S. C. A., §79a, *et seq.*), §§ 6, 7, 11(b) (2), 11(e).

Statutes of New York State: Stock Corporation Law, §26-a, §38(1); Public Service Law, §69.

Statement.

The petitioner, Public Service Commission of the State of New York (hereinafter called "PSC") is the head of the Department of Public Service of the State of New York.

It has plenary jurisdiction over public utility companies within the State of New York. Among its regulatory powers delegated by several State statutes is the supervision of the capitalization of public utility corporations and of the issuance of their securities (Public Service Law, §69; Stock Corporation Law, §38(1)), including changes in the capital structure and the issuance of securities by such corporations pursuant to a plan of reorganization or other plan proposed under the Public Utility Holding Company Act of 1935 (Stock Corporation Law, §26-a).

The Kings County Lighting Company (hereinafter called "Kings"), is a New York corporation and is a local electric utility company operating wholly within the State of New York. It is a subsidiary of Long Island Lighting Company (also an intrastate operating utility company) which is a registered holding company under the Public Utility Holding Company Act of 1935 (hereinafter called the "Act"). The Long Island Lighting Company presently owns 97.736 per cent. of the outstanding shares of the common stock of Kings.

On July 21, 1945 Kings filed with PSC a petition requesting the approval of PSC to a reduction of its capital stock and for approval of the issuance of new common and preferred stock. PSC, by a memorandum dated February 5, 1946, indicated its criticism of the proposed recapitalization and refused its approval.

While this petition was pending before PSC on August 25, 1945, Kings filed a plan with the Securities and Exchange Commission (hereinafter called "SEC") pursuant to Section 11(e) of the Act for the stated purpose of effecting a fair and equitable distribution of the voting power among the security holders of Kings. The plan contained the same provisions in respect to the recapitalization of the company as were contained in the application to PSC.

Subsequent to the PSC memorandum critizicing the original plan, Kings filed with PSC an amended plan as of April 16, 1946 and requested approval of a certificate reducing and reclassifying its capital stock and approval of the issuance of new securities in accordance therewith. This amended plan was also filed with SEC.

SEC held public hearings on the amended plan and on December 13, 1946 handed down findings and an opinion (R., p. 160) indicating that it would approve the amended plan provided that it was further modified in certain respects. Thereupon Kings filed with SEC a further amended plan dated January 6, 1947 (R., p. 99). The plan as finally amended contained the same provisions in respect to the securities proposed to be issued and the proposed allocations thereof among the stockholders of Kings as those contained in the amended plan of April 16, 1946.

At the times of the above-stated applications to PSC and to SEC, Kings had and now has outstanding shares of preferred stock of three series having a total par value of $4,400,000 and 50,000 shares of common stock without par value but having a stated value of $2,000,000. Under the plan as finally amended, Kings would have, instead, preferred stock of one series having a par value of $2,200,000 and 440,000 shares of common stock without par value but having a stated value of $2,200,000.

Under the plan as finally amended all of the proposed new stock, both preferred and common, would be distributed to the present preferred stockholders with the exception of 7½ per cent. of the new common stock which would be distributed to the present common stockholders.

The plan as finally amended provides that the Long Island Lighting Company, the holder of 97.736 per cent. of the outstanding common stock of Kings, shall divest itself

of the shares of new common stock to be received by it under the plan as amended, within one year after the acquisition thereof.

The plan as amended further provides, in part, as follows:

> *"Steps to be Taken to Make the Amended Plan Effective.*
>
> 1. The directors of the Company have approved the Amended Plan and authorized the filing of an appropriate petition or application with
>
> (a) the Public Service Commission of the State of New York for its consent and approval of the Amended Plan and for authority for Kings County Lighting Company to issue its securities to carry out the Amended Plan;
>
> (b) the Securities and Exchange Commission for its approval of the Amended Plan to the extent required" (R., p. 44).

The notice of filing of the amended plan issued by SEC under date of April 18, 1946, read in part, as follows:

> "All interested persons are referred to said amended plan, which is on file in the offices of this Commission for a full statement of the transactions and terms proposed therein which may be summarized as follows (R., p. 53):
>
> • • • • • •
>
> The amended plan will be submitted to the Public Service Commission of the State of New York for its consent and approval thereto and for authority to issue the securities to carry out the amended plan" (R., p. 55).

On March 6, 1947, PSC adopted a memorandum and issued an order denying the application of Kings for

approval of the certificate reducing and reclassifying its capital stock and for approval of the issuance of the new securities, as proposed in the amended plan of April 16, 1946, for the reason that PSC had determined that the present common stockholders of Kings had no equity in the assets of Kings to justify a distribution to them of any of the proposed new common shares.

Meanwhile by order dated January 9, 1947 (R., p. 118), SEC approved the further amended plan of Kings and on the same date applied to the District Court of the Eastern District of New York for an order enforcing and carrying out the terms and conditions of the further amended plan (R., p. 4).

On January 9, 1947, Judge Grover M. Moskovitz made an order (R., p. 124) directing a hearing on the application and ordering Kings to give notice of such hearing to its stockholders and to the parties appearing in the proceedings before SEC and to PSC and the Secretary of State of the State of New York.

Hearings in the enforcement proceeding were held before Judge Harold M. Kennedy at which PSC appeared in opposition to the application. On July 3, 1947, Judge Kennedy handed down his opinion granting the application of SEC (R., p. 288) and on July 16, 1947 an enforcement order (R., p. 319) was signed by Judge Kennedy and entered in the office of the Clerk of the District Court.

From this order of July 16, 1947 PSC and the Secretary of State appealed to the United States Circuit Court of Appeals for the Second Circuit. The appeal was argued before that Court on February 9, 1948 and the decision and judgment of the Circuit Court were handed down on March 5, 1948 (R., p. 402).

Questions Presented.

1. May a local intrastate operating utility company, which is not a holding company as defined in the Act, be recapitalized and new securities issued by such a company under authority obtained from SEC without the approval of PSC as required by the statutes of the State of New York.

2. If the Act is to be construed as permitting such recapitalization and issuance of securities without the approval of PSC, is the Act constitutional as applied to this case?

3. Is the plan as finally amended fair and equitable and feasible?

Reasons Relied on for Allowance of the Writ.

1. This is the first case to present the question of whether a local intrastate operating utility company may be recapitalized and may issue new securities pursuant to authority obtained from SEC under Section 11 of the Act, without the approval of the State regulatory agency as required by the State statutes. This is an important question which has not been, but should be settled by this Honorable Court.

2. The question of the constitutionality of the Act, if it is to be construed as permitting such recapitalization and issuance of securities, under the circumstances of this case, without approval of a State regulatory commission as required by State law, is a novel and important question which has not been but should be settled by this Honorable Court.

3. While the question of whether the particular provisions of the plan involved in this case are fair, equitable and feasible, standing alone, is not of controlling importance, such question is so interrelated with the important matters stated above that the same is of sufficient importance to warrant a determination by this Honorable Court.

Prayer.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the Court (or if its mandate has gone down to the United States District Court for the Eastern District of New York, commanding that Court) to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case in said Circuit Court, and that the decision of the United States Circuit Court of Appeals for the Second Circuit affirming the order of the District Court be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem mete and just.

Respectfully submitted,

FRANK C. BOWERS,
Solicitor for Petitioner, Public Service Commission of the State of New York.

Dated, April 23, 1948.

Supreme Court of the United States

OCTOBER TERM 1947

No. .....

IN THE MATTER

of

KINGS COUNTY LIGHTING COMPANY

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF FOR PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITION FOR CERTIORARI.

The Circuit Court of Appeals for the Second Circuit has held in this case that a plan for the recapitalization of a local intrastate operating utility company, filed with SEC under Section 11 of the Act may be made effective and enforced without the approval of PSC as required by State law and in the face of the express disapproval of PSC.

For the reasons stated in the annexed petition, the case involves important questions in respect to the construction and constitutionality of the Act as applied to this case, which have not been but which should be passed upon by this Honorable Court.

Note: The same abbreviations and designations used in the annexed petition will also be used in this brief.

This brief is submitted in amplification of the position of PSC upon the merits of the controversy.

Applicable Sections of the Federal Statute.

The sections of the Public Utility Holding Company Act (Act of August 26, 1935, Ch. 68, Title 1, sec. 33, 49 Stat. 838, 15 U. S. C. A., Section 79 *et seq.*, herein called the Act) bearing on this case are as follows:[1]

Section 6 provides, in part, as follows:

> "(a) Except in accordance with a declaration effective under section 79(g) and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company."

Section 7 provides, in part, as follows:

> "(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this chapter, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected."

---

[1] Section 1 of the Act has become 15 U. S. C. A. Section 79(a); Section 2, 15 U. S. C. A. Section 79(b), and thereafter the section numbers are translated into letters of the alphabet. The quotations in this brief are taken from U. S. C. A.

Section 11(b) (2) provides, in part, as follows:

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect of each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

"The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 79x of this chapter."

Section 11(e) provides, in part, as follows:

"In accordance with such rules and regulations or order as the Commission may deem necessary or

appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce and carry out the terms and provisions of such plan."

Applicable Sections of the Laws of the State of New York.

Section 26-a of the Stock Corporation Law provides, in part, as follows:

"1. Any stock corporation, a plan or reorganization or other plan for which corporation, pursuant to and in the manner required by the act of congress of August twenty-sixth, nineteen hundred thirty-five, entitled 'Public utility holding company act of 1935,' as amended (herein referred to as the public utility holding company act of nineteen hundred thirty-five), has been approved or enforced by decree or order of a court of competent jurisdiction, shall have full power and authority to put into effect and carry out the plan and the decrees and orders of the court relative thereto and make take any proceeding and

do anything for which provision is made in any statute governing the corporation or for which provision is or might be lawfully made in its certificate of incorporation or by-laws (except as otherwise provided in subdivision (3) of this section) and for which provision is made in such plan, or which is directed by said decrees or courts;

"Provided, however, that any such plan, decrees or orders, relating to or affecting any corporation subject to the jurisdiction of the public service commission of the state of New York, shall neither be carried out nor given any effect unless and until said public service commission (i) shall have found such plan to be in the public interest and (ii) shall have approved by written order any changes in the capital structure, transfer of assets, or issuance of securities for which provision is made in such plan, decrees or order."

Section 38, subdivision 1, of the Stock Corporation Law provides, in part, as follows:

"The following provisions shall be applicable to a certificate under section thirty-six.

"1. A corporation subject to the provisions of the public service law shall not file such a certificate, nor shall the secretary of state accept or file such a certificate, unless it shall have endorsed thereon the consent and approval of the commission having jurisdiction of such corporation."

Section 69 of the Public Service Law provides, in part, as follows:

"A gas corporation or electric corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof, or a receiver of such

a corporation, if duly authorized by law, may issue receiver's certificates, when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds, notes or other evidences of indebtedness of such corporation, within five years next prior to the filing of an application with the commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided and not otherwise that there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidences of indebtedness is or has been reasonably required for the purposes specified in the order, * * *."

The Principal Issue in This Case.

Broadly stated, the ultimate issue in this case is whether a local intrastate operating utility company, which is not a holding company, as defined in the Public Utility Holding Company Act, may be recapitalized under authority obtained from SEC, without the approval of PSC as required by the statutes of the State of New York.

ARGUMENT.

POINT I.

The statutes of the State of New York require the approval of PSC to the plan. Unless there is irreconcilable conflict between the Federal and State statutory schemes, in respect to this case, the plan may not be enforced without PSC approval.

The State of New York, in the exercise of its undoubted regulatory power over intrastate operating utility companies, and over its domestic corporations, has enacted statutes requiring the approval of PSC to changes in the capital structures of utility corporations, to the issuance of securities by such corporations and, specifically, to the carrying out of a plan of reorganization under the Act.

Section 38 of the Stock Corporation Law requires the consent and approval of PSC to the filing of certificates amending the certificate of incorporation of a corporation subject to the provisions of the Public Service Law. Accordingly, a recapitalization of a public utility corporation, requiring such an amendatory certificate, cannot be accomplished, and the Secretary of State is specifically forbidden to accept such a certificate for filing in his office, without the consent and approval of PSC. Such consent and approval is not a *pro forma* act but requires the exercise of sound discretion, for the protection of investors and of the public, in a quasi-judicial proceeding, subject to review by the State courts.

Matter of Rochester Gas & Electric Corp. v. *Maltbie,* 258 App. Div. 682, affd. 284 N. Y. 686.

Under Section 69 of the Public Service Law, a gas corporation or an electric corporation incorporated under the

laws of the State of New York may not issue stocks, bonds or other securities except for the purposes specified in Section 69 and may not issue any such securities without the consent and approval of PSC, granted after full investigation of the purposes for which the securities are to be issued and of the financial condition of the company, and upon finding that the securities are to be issued for the purposes stated in the statute and that the issuance is in all respects proper and in the public interest.

Matter of Staten Island Edison Corp. v. *Public Service Commission,* 263 N. Y. 209.

In 1946, the foregoing statutory provisions were supplemented by the enactment of Section 26-a of the Stock Corporation Law which specifically relates to plans of reorganization promulgated under the Act. Section 26-a contains full and detailed provisions relating to the procedure to be followed with reference to such a plan of reorganization, and provides for the execution of such plan without approval of the stockholders of the corporation, provided that PSC approves the plan and finds the same to be in the public interest.

The statutes of the State of New York are plain and unequivocal. They require, as a matter of State law that any recapitalization of an operating utility company, such as Kings, and the issuance of new securities by such a company, shall be subject to the approval of PSC founded upon a finding that the same are in the public interest. The statutes contain no exceptions.

It is apparent that unless there is irreconcilable conflict between Federal and State statutory schemes, with reference to the circumstances of this case, the proposed plan for the reorganization of Kings cannot be enforced without PSC approval as required by the State statutes.

POINT II.

There is no irreconcilable conflict between the Federal and State statutory schemes under the circumstances of this case.

A. The plan itself requires the approval of PSC.

The requirement for approval of PSC under the State law to the recapitalization of Kings and the issuance of new securities to carry the plan into effect, was tacitly recognized throughout the proceedings before SEC. This recognition became finally crystallized in the provision of the plan calling for the approval of PSC as one of the "steps to be taken to make this amended plan effective".

Under the provisions of the plan itself there could be no conflict between the operation of the Federal and State statutory schemes. SEC has approved a plan expressly calling for an application to PSC for its approval. Thereafter PSC disapproved and refused to consent to the recapitalization and issuance of securities proposed by the plan. Accordingly the plan could not be made effective in accordance with its provisions.

PSC took the position before the District Court that under these circumstances the case should be remanded to SEC for further consideration in the light of the disapproval of PSC. Counsel for SEC thereupon took the position, for the first time, that the approval of PSC was not "essential".

The District Court recognized that its "narrow statutory jurisdiction" under Section 11(e) of the Act did not permit the Court to amend the plan. This had been established beyond serious question.

In re: Laclede Gas Light Co., 57 Fed. Supp. 997, 1032, affd. 151 Fed. (2d) 424; cert. den. 327 U. S. 795;

In re: Electric Bond & Share Co., 73 Fed. Supp. 426; 161 Fed. (2d) 978;

In re: New England Public Service Co., 72 Fed. Supp. 452.

Nevertheless the District Court proceeded to excise the requirement for PSC approval from the plan upon the theory that it was not "essential". The Circuit Court also took the view that the requirement for PSC approval was not an "essential" part of the plan and held that the District Court was "free to disregard it".

There was no warrant for the conclusion of the Courts below that the requirement of the plan calling for approval of PSC as one of the "steps to be taken to make the amended plan effective", was not an "essential" part of the plan. Both the District Court and the Circuit Court confused the question of whether it was "essential" for Kings to obtain the approval of PSC under the provisions of the plan, and the separate question of whether such approval is required under the provisions of the Act, and thus fell into error.

The plan was approved by SEC after hearings upon notice to the interested parties. From the very outset the plan had contained provisions calling for approval of PSC. No objection was ever raised by anyone to the inclusion of such a requirement in the plan. The plan as finally amended contains provisions calling for such approval. Concededly, the District Court had no power to amend the plan. We submit that the District Court had no power to disregard this express provision of the plan upon the theory that it was not "essential", and thus accomplish what it concededly lacked authority to do—amend the plan.

Under the express provisions of the plan there is and can be no conflict in the operation of the Federal and State statutory schemes. The statutes of the State require the approval of PSC. The plan itself requires such approval. Only by a complete disregard of the explicit provisions of the plan is any semblance of conflict presented.

Under the provisions of the Act, the District Court was empowered to enforce the plan only in accordance with its provisions. The requirement of the plan for approval by PSC was an essential part of the plan and the Courts below erred in treating it as surplusage.

B. The Act requires that approval of the local regulatory commission be obtained with respect to the recapitalization of, and issuance of securities by, an intrastate operating company.

Wholly apart from the provisions of the plan, the approval of PSC to the recapitalization of and issuance of securities by Kings was "essential" by virtue of the provisions of Section 7(g) of the Act.

The primary purpose of the Act was the regulation, control and simplification of holding companies. Section 1 of the Act clearly indicates that it was enacted primarily to regulate holding companies and not instrastate operating companies.

The Act contains many provisions demonstrating the intention of Congress to leave unimpaired the regulatory powers of the States over local operating companies. This preservation of the regulatory powers of the States is expressly recognized and provided for in Section 7(g) of the Act which specifically requires that SEC shall be satisfied that State laws have been complied with before authorizing a voluntary recapitalization or plan calling for the

issuance of securities by a holding company or by a subsidiary company.

The opinion of SEC in the instant case specifically states (R., p. 90):

> "It appears that the standards of Section 7 are satisfied."

To find that the standards of Section 7 of the Act had been satisfied by the provisions of the plan, SEC must have had in mind the State statutes requiring an operating utility in the State of New York to secure PSC's approval before recapitalizing and issuing securities (Public Service Law, §69; Stock Corporation Law, §§26(a), 38(1)).

SEC itself has repeatedly recognized that Section 7(g) is applicable to any plan under Section 11 which involves the issuance of securities.

> *Matter of Derby Gas & Electric Corp.*, 9 SEC 686;
> *Matter of Jacksonville Gas Co.*, 11 SEC 449;
> *Puget Sound Light & Power Co.*, 13 SEC 225;
> *In re: Columbia Gas & Electric Corp.*, SEC Release 6840.

Despite SEC's administrative construction of Section 7(g) of the Act as a limitation upon its powers in proceedings under Section 11 of the Act, the Courts below have held that Section 7(g) does not apply to this case and does not require the approval of PSC to the plan and the recapitalization of and issuance of securities by Kings thereunder.

The rationale of the decisions below is that if Section 7(g) of the Act is applicable to this type of case, the State regulatory agencies, in this case PSC, would have a "veto"

power over any plan proposed under Section 11 of the Act and approved by SEC thereunder. This, the Courts below say, would frustrate action by SEC under Section 11 and is intolerable. Therefore, they say, Congress did not intend that Section 7(g) should apply to proceedings under Section 11.

We respectfully submit that the Circuit Court of Appeals gave too narrow a construction to the Act in limiting the requirements of compliance with State laws to voluntary reorganization proceedings. It is apparent upon the face of the Act and from its history and recognized purposes that Congress saw no necessity for the usurpation of the entire field of reorganization of intrastate utility companies to the exclusion of appropriate State functions. This is evidenced by the restrictive provisions of Section 7(g). The narrow construction adopted by the Circuit Court is contrary to the intent of Congress which was to create a remedial statutory scheme under which the powers of the Federal and State governments would be integrated and not conflicting.

In view of the very limited jurisdiction of SEC under Section 11(e) of the Act in respect to local intrastate operating companies (see subdivision C, *infra*), the narrow construction of Section 7(g) adopted by the Circuit Court is not in accord with the history and purposes of the Act and is not sustainable.

We submit, in accordance with the administrative construction adopted by SEC itself, that Section 7(g) of the Act is applicable to this case and that by the force of its provisions the approval of PSC, in accordance with the State statutes, was an essential prerequisite to carrying into effect the plan of reorganization presented in this case.

C. In any event there is no irreconcilable conflict between the Federal and State statutory schemes which would warrant the conclusion that the State requirements had been superseded by paramount federal law.

Even if it be assumed, *arguendo,* that it was proper for the Courts below to disregard the plain and unequivocal provisions of the plan, and also that Section 7(g) of the Act does not apply to this case, we submit that Congress has not occupied the regulatory field in respect to the recapitalization of and issuance of securities by intrastate operating companies to such an extent as to call into play the principle stated by the District Judge, that "where Congress, in the exercise of its constitutional powers, passes an act conferring powers on a federal body, the several states have been deprived of authority to confer the same powers on a state body." (R., p. 302)

In Section 11(e) of the Act, Congress has clearly indicated that SEC is not to have general power over the recapitalization of or issuance of securities by intrastate operating utilities which are not holding companies. The limitation reads as follows:

> "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company or of any company whose business is that of a public utility company."

The sole concern of SEC under Section 11(e) is to see that the voting power is fairly and equitably distributed among the security holders of such a company. It is not concerned with the capital structure or the issuance of securities from the standpoint of the public interest in respect to those matters.

PSC on the other hand is vitally concerned as the regulatory agency of the State of New York with the capital structure of local operating companies, with the issuance of their securities, with their accounting practices and the rates which they are to be permitted to charge. It has sole and exclusive jurisdiction in respect to such matters. SEC has none.

The situation presented by the two statutory schemes, each having different and varied purposes, is not one of conflict. It is one which calls for cooperation and coordination of the activities of the Federal and State regulating agencies within their respective spheres.

In the present case SEC and PSC are in agreement that the present distribution of the voting power of the security holders of Kings is not fair and equitable. The common stock has no present equity in the assets of Kings, but the common stockholders possess the entire voting power. The preferred stockholders are the real owners of the corporation and should possess voting power commensurate with their real ownership of the assets. Upon this the two regulatory agencies are agreed.

The "rock upon which the two Commissions have split", as the District Judge described the situation (R., p. 298) is simply whether the common stockholders are to receive 7½ per cent of the new common stock or none at all. This is not a question primarily of the distribution of voting power, but of the capital structure of the corporation and of the distribution of the new securities to be issued. Not only voting power but the ownership of the corporate assets by the two classes of stockholders (preferred and common) is involved. This, we submit, is a matter upon which PSC should have, and under the provisions of the Act was intended to have, the final say. Adoption by SEC of the

method of allocation suggested by PSC would result in remedying the unfair and inequitable distribution of voting power as it now exists and at the same time would preserve to the State of New York the regulatory power which it possesses in respect to the corporate structure and securities to be issued.

We submit that the case does not involve the principle of the paramountcy of Federal power and that the requirements of the State statutes have not been overridden by the operation of Section 11 of the Act as applied to the circumstance of this case.

POINT III.

If there is conflict between the Federal and State statutory schemes, the Federal Act is unconstitutional as applied to this case.

It is obvious that Kings is not engaged in interstate commerce and that its activities do not affect such commerce in any manner which would warrant Congressional interference designed to override the power of the State to regulate public utility corporations within the state.

> *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204;
> *North Carolina* v. *United States*, 325 U. S. 507;
> *Smyth* v. *Asphalt Belt R. Co.*, 292 Fed. 876.

Moreover, if the Act were intended to override the State statutes governing the regulation of local operating companies, it would constitute an unconstitutional encroachment upon the reserved powers of the States in respect to their domestic corporations. The recapitalization of local corporations involves fundamental changes in the corporate charters granted by the State. The exercise of

Federal power in respect to such changes may not supersede state regulation thereof.

Hopkins Savings Association v. *Cleary,* 296 U. S. 315.

We submit that the constitutional questions involved in this case are substantial and important, and that they warrant the granting of a writ of certiorari so that this Court may examine them upon the merits and avoid any possibility of an improper encroachment by the Federal Government upon the sovereign powers of the States.

POINT IV.

The provisions of the plan are neither fair and equitable, nor feasible.

PSC found that upon an asset basis the common stockholders had no equity in the property of Kings and, therefore, were not entitled to receive any of the new common stock proposed to be issued under the plan.

SEC also made findings indicating that if the arrearages in preferred stock dividends were to be taken into account, the common stock had no present equity in the assets of the corporation.

SEC approved the proposed allocation of 7½ per cent of the new common stock to the present common stockholders solely upon the speculative hypothesis that Kings would earn an average net income of $326,500 for a period of ten years. Even upon this unwarranted assumption it would take ten years to pay the arrearages in preferred stock dividends. Under the findings of SEC, ten years must elapse before any earnings would be available for payment of dividends on the new common stock.

The plan is patently not fair and equitable to the preferred stockholders.

Moreover, in view of the disapproval of PSC and the non-compliance with the requirements of the State statutes, the plan is not feasible.

Conclusion.

A writ of certiorari should be granted in accordance with the prayer of the annexed petition.

Respectfully submitted,

FRANK C. BOWERS,
Solicitor for Petitioner, Public Service Commission of the State of New York.

Dated, April 23, 1948.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	3
Conclusion	9
Appendix	20

CITATIONS

Cases:

American Power & Light Company v. *Securities and Exchange Commission*, 329 U. S. 90	13
Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510	17
Eastern Minnesota Power Corporation and Wisconsin Hydro-Electric Company, D. Minn., Fifth Div. No. 844 (1947)	10
Ecker v. *Western Pacific R. Co.*, 318 U. S. 448	17
First Iowa Hydro-Electric Cooperative v. *Federal Power Commission*, 328 U. S. 152	12
Georgia Power & Light Company, M.D. Ga. No. 133 (1945)	10
Group of Institutional Investors v. *Ch., M., St. P. & P. RR. Co.*, 318 U. S. 523	17
Hopkins Federal Savings Association v. *Cleary*, 296 U. S. 315	18
Indiana Service Corporation, N.D. Ind. No. 313 (1947)	10
Jacksonville Gas Company, In re, 46 F. Supp. 852	16
Laclede Gas Light Company, In re, 57 F. Supp. 997, affirmed *sub nom. Massachusetts Mutual Life Ins. Co.* v. *Securities and Exchange Commission*, 151 F. 2d 424, certiorari denied, 327 U. S. 795	10, 15
Minnesota Power & Light Company, D. Minn. No. 817 (1945)	10
Otis & Co. v. *Securities and Exchange Commission*, 323 U. S. 624	9, 17, 18
People v. *New York C. R. Co.*, 233 N. Y. 679, 135 N.E. 967, affirming, 199 App. Div. 949, 191 N. Y. Supp. 944	19
Puget Sound Power and Light Co., Holding Company Act Release No. 4255, plan enforced without opinion, D. Mass. No. 2308 (1943)	10, 16
Reconstruction Finance Corporation v. *Denver & R. G. W. R. Co.*, 328 U. S. 495	17

Page

Schwabacher v. *United States*, No. 258, October Term, 1947 ..... 16, 17
Southern Colorado Power Co., Holding Company Act Release No. 4501, plan enforced without opinion, D.C. Colo. No. 670, affirmed *sub nom. Disman* v. *Securities and Exchange Commission*, 147 F. 2d 679, certiorari denied, 325 U. S. 863 ..... 10, 16
Spokane Gas & Fuel Company, E.D. Wash., No. 494 (1945) 10
United Gas Corp., In re, 58 F. Supp. 501, affirmed, 162 F. 2d 409 15
Utah Power & Light Company, D. Utah (1946) 10
Western Union Telegraph Co., In re, 51 P.U.R. (N.S. 1944) 404 19
York County Gas Company, M.D. Pa. No. 1652 (1945) .. 10

Statutes:

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79a, *et seq.*:
Section 1 11
Section 6 11
Section 7 ..... 11, 14
Section 7(c) 13
Section 7(d) 13
Section 7(e) 13
Section 7(g) 13, 14, 20
Section 9 11
Section 10 11
Section 11(b) 12, 20
Section 11(b)(2) 6, 13, 15, 20
Section 11(d) 21
Section 11(e) 3, 8, 16, 17, 22
Section 13 11
Section 15 11
Section 19 7
Section 20 ..... 11, 19
Section 21 12
New York Public Service Law, Section 69 5

New York Stock Corporation Law:
Section 26-a 5
Section 38(1) 5, 19

Miscellaneous:

H. Rep. No. 1318, 74th Cong., 1st Sess., p. 7 13
Record of the proceedings of the National Association of Railroad and Utilities Commissioners for 1945, p. 74 .. 14
S. 2796, 74th Cong., 1st Sess. 12

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 769

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 393-399) is reported at 166 F. 2d 784. The opinion of the District Court (R. 288-318) is reported at 72 F. Supp. 767. The findings and opinion of the Securities and Exchange Commission (R. 60-98) have not yet been officially reported but are set forth in the Commission's Holding Company Act Release No. 7060.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on March 5, 1948 (R.399). The petition for a writ of certiorari was filed on April 28, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79 y).

QUESTIONS PRESENTED

1. Whether, in the case of a plan under Section 11(e) of the Public Utility Holding Company Act of 1935, found necessary to correct inequitable distribution of voting power among security holders of an operating subsidiary of a registered holding company, the Act vests in the Securities and Exchange Commission and the Federal courts exclusive power to determine whether the allocation of new securities is "fair and equitable", or empowers a State commission having regulatory jurisdiction over the operating company to veto the plan because of disagreement as to that issue.

2. Whether the Holding Company Act is unconstitutional if construed as not conferring such a veto power upon State commissions.

3. Whether the Court below erred in upholding the conclusions of the Securities and Exchange

Commission and the District Court that the instant plan is "fair and equitable."

STATUTES INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a, *et seq.* (hereinafter referred to as the Act) are set out in the Appendix, *infra,* pp. 20-23. The New York statutes upon which petitioner relies are described in note 5, *infra,* pp. 5-6.

STATEMENT

Petitioner seeks review by this Court of a judgment of the Circuit Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Eastern District of New York approving a plan of reorganization previously approved by the SEC under Section 11(e) of the Act. The sole objectors to the Plan in the courts below were the Public Service Commission of the State of New York (hereinafter referred to as "the PSC") and the Secretary of State of the State of New York.[1]

The Plan was filed with the SEC by Kings County Lighting Company (hereinafter referred to as "Kings"), an operating subsidiary of Long Island Lighting Company, which in turn is a regis-

[1] Representatives of the several classes of stockholders, including representatives of a substantial group of the preferred stockholders (R. 161) in whose interest the PSC seeks a larger participation, recommended approval of the Plan in the District Court (R. 183). The Secretary of State simply endorsed the position taken by the PSC.

tered public utility holding company.[2] Kings is a corporation organized under the laws of New York and is engaged in the manufacture, distribution and sale of gas in Kings County in the State of New York (R. 63). Its securities are held by persons residing in twenty-eight States and three foreign countries (R. 373-74) and are traded through the channels of interstate commerce (R. 193).

Kings has outstanding 44,000 shares of $100 par value cumulative preferred stock, and 50,000 shares of no par value common stock with a stated value of $40 per share (R. 66). As of April 30, 1946,[3] dividend arrearages on the preferred stock of Kings represented an accumulation of almost three

---

[2] In 1936, the SEC accorded the Long Island Lighting Company system an administrative exemption from the Holding Company Act because of its predominantly intrastate character. In 1944, the PSC condemned a management-proposed recapitalization plan of the Long Island Lighting Company and noted that, unlike the SEC, it could not compel appropriate reorganizations but could only approve or disapprove plans submitted to it by the management. There ensued litigation by which the SEC attempted to stay consummation of the recapitalization pending a determination, after hearing, whether the 1936 exemption should be revoked. The litigation reached this Court with the granting of the SEC's petition for a writ of certiorari, 324 U. S. 837, but the cause was later dismissed as moot, 325 U. S. 833, the SEC having revoked the 1936 exemption because of changed conditions which established a basis for Federal intervention to protect the interests of the Long Island system's scattered security holders. The exemption was revoked only to the extent necessary to bring the registration and reorganization provisions of the Act into play. These proceedings are discussed in the opinion of the District Judge (R. 291-293), and in greater detail at R. 184-221, 376-383.

It is not disputed that the SEC has jurisdiction to consider a plan of reorganization of Kings under Section 11(e).

[3] The financial statements considered by the SEC in its administrative proceeding, and in turn by the District Court, are carried to April 30, 1946.

years of full dividends. No dividends have been declared on the common stock since 1936 (R. 64-66). On the basis of book value or liquidating value, after giving effect to concededly necessary accounting adjustments, the common stock is without any equity in the enterprise, being, in fact, "under water" to the extent of at least 2.1% of the adjusted capitalization and surplus (R. 66).[4] Nevertheless, the common stock, some 98% of which is owned by Long Island Lighting Company, has the exclusive voting power for the election of directors (R. 66-67).

On or about August 20, 1945, Kings filed a reorganization Plan with both the SEC and PSC, its submission to the latter Commission being for approval "to the extent required by the laws of the State of New York for the changes and issuance of stock necessary to effectuate and carry out said Plan" (R. 25).[5] The Plan was designed to effectu-

---

[4] On the basis of somewhat different computations, the PSC found the common stock to be "under water" to a larger extent (R. 243).

[5] Section 38(1) of the New York Stock Corporation Law provides that a corporation shall not file an amended certificate of incorporation with the Secretary of State, and the Secretary of State shall not accept or file such a certificate, "unless it shall have endorsed thereon the consent and approval of the commission having jurisdiction of such corporation." Section 69 of the New York Public Service Law provides, in general, that a public utility company organized under the laws of New York may not issue securities without first securing from the Public Service Commission an order authorizing such issue. Section 26-a of the New York Corporation Law provides that a New York corporation which is the subject of a court-approved reorganization plan under the Holding Company Act may

ate an equitable distribution of voting power among the security holders of Kings in conformity with the requirements of Section 11(b)(2) of the Holding Company Act.

After hearings, and on February 5, 1946, the PSC issued a memorandum in which it criticized the Plan and concluded, among other things, (1) that certain accounting adjustments should be carried out in accordance with previous suggestions of the PSC; (2) that certain changes should be made in the proposed new capital structure; and (3) that the allocation of new securities to the old common stockholders should be limited to a "nominal amount" at most (R. 223-224).

On or about April 16, 1946, Kings amended its application before the PSC and its Plan before the SEC so as to incorporate therein the suggestions of the PSC with respect to capital structure and related accounting adjustments. The Amended Plan provided for a new capital structure consisting of $2,200,000 of preferred stock and $2,200,000 of common stock. Ten percent of the new common stock was to go to the existing common stock-

---

do any of the things required by the court order or contemplated by the plan, but that

> any such plan, decrees or orders, relating to or affecting any corporation subject to the jurisdiction of the public service commission of the state of New York, shall neither be carried out nor given any effect unless and until said public service commission (i) shall have found such plan to be in the public interest and (ii) shall have approved by written order any changes in the capital structure, transfer of assets, or issuance of securities for which provision is made in such plan, decrees or order.

holders. The rest of the common stock, all of the preferred stock, and $191,484 in cash were to go to the existing preferred stockholders (R. 25-51).

Hearings upon the Amended Plan were held before the SEC, and various groups of interested security holders participated (R. 61). The PSC was given notice of the proceedings (R. 373), but did not avail itself of its right to become a party under Section 19 of the Act.[6] On December 13, 1946, the SEC issued its findings and opinion (R. 60-98). It interposed no objections to the proposed new capitalization and accounting adjustments. With respect to the allocation provisions of the Amended Plan, it found that the common stockholders were entitled to some participation reflecting their interest in prospective earnings under the existing capital structure, but that it could not find the plan "fair and equitable" unless the allocation of new common stock to the existing common stockholders were reduced from 10% to 7½% (R. 72-87).[7] On January 8, 1947, Kings filed with the SEC an amendment conforming to these suggestions (R. 99-117), and on January 9, 1947, the SEC

---

[6] Section 19 provides in part:

> • • • In any proceeding before the Commission, the Commission • • • shall admit as a party any interested State, State commission, State securities commission. • • •

[7] The allocation of 7½% of the new common stock to the existing common stockholders represents a participation of 3.77% in the consolidated net assets of the company. This interest is also, of course, in a junior position as to earnings and distribution in event of liquidation.

entered its order approving the Amended Plan as thus further amended (R. 118-123).

At the request of the company, and pursuant to the provisions of Section 11(e), the SEC, on the same day, filed an application with the United States District Court for the Eastern District of New York for an order approving and enforcing the Plan (R. 4).

During the pendency of the District Court proceedings, the PSC rendered an opinion disapproving the Amended Plan; as is expressly stated in the present petition (Pet. 6, 23), the sole point of difference between the two agencies is over the question of the participation of the existing common stockholders, the PSC contending that they should receive no recognition at all in the reorganization.

Subsequently, counsel for the PSC urged the District Court to remand the Plan to the SEC upon various grounds, of which the following have not been abandoned in the present petition: (1) The Holding Company Act requires that approval of the local regulatory commission be obtained with respect to a Section 11(e) reorganization affecting an intrastate operating company; (2) the Holding Company Act is unconstitutional if construed as permitting the consummation of reorganization plans affecting intrastate operating companies without the approval of local regulatory commissions; and (3) the Plan is neither fair and equitable, nor feasible.

The Secretary of State of the State of New York endorsed the position of the PSC. All other parties, including representatives of the preferred stockholders (R. 183), recommended approval of the Plan. The District Court overruled the objections of the PSC in a carefully considered opinion (R. 288-318), and entered an order approving and enforcing the Plan (R. 319-322). The order of the Circuit Court of Appeals affirmed in all respects the order of the District Court (R. 399). Consummation of the Plan has been held in abeyance during the pendency of appellate proceedings (R. 367-368).

ARGUMENT

Insofar as the petitioner merely challenges the application by the Commission and both courts below of the "fair and equitable" standard to the instant plan, its contentions are either limited in their application to the facts of the present case or, as more fully revealed in the record, are in direct conflict with the uniform course of decisions by the SEC and the courts, including this Court's decision in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624. Indeed, petitioner concedes that this question "standing alone, is not of controlling importance. . . ." (Pet. 8).

Insofar as the petition assumes that the SEC and the courts below properly interpreted and applied the fair and equitable standard of Section 11(e), but nevertheless contends that the Federal

standard of what is fair and equitable treatment of the security holders may be overridden by a State authority, the issue raised is concededly of importance but is adequately dealt with by the court below, and does not require further review by this Court. There is no claim of conflict among the circuits, and indeed this is the first instance in more than ten years of administration of the Holding Company Act where there has been presented at even the administrative level the assertion by a State commission of power to veto a Section 11(e) plan.[8] It should be noted that even in this case the

---

[8] Numerous section 11(e) plans, many of which have involved reorganizations of public utility operating companies, have been enforced in Federal district courts in some ten different States. Some of such proceedings are: *Puget Sound Power & Light Company, et al.,* D. Mass. No. 2308 (1943) (an operating company incorporated in Massachusetts and doing business in Washington); *Southern Colorado Power Company,* D. Colo. No. 670 (1944), affirmed *sub nom. Disman* v. *Securities and Exchange Commission,* 147 F. 2d 679 (C.C.A. 10), certiorari denied, 325 U. S. 863; *In re Laclede Gas Light Company,* 57 F. Supp. 997 (E. D. Mo.), affirmed *sub nom. Massachusetts Mutual Life Ins. Co.* v. *Securities and Exchange Commission,* 151 F. 2d 424 (C.C.A. 8), certiorari denied, 327 U. S. 795; *York County Gas Company,* M. D. Pa. No. 1652 (1945); *Georgia Power & Light Company,* M. D. Ga. No. 133 (1945); *Minnesota Power & Light Company,* D. Minn. No. 817 (1945); *Spokane Gas & Fuel Company,* E. D. Wash. No. 494 (1945); *Utah Power & Light Company,* D. Utah (1946); *Indiana Service Corporation,* N. D. Ind. No. 313 (1947); *Eastern Minnesota Power Corporation* and *Wisconsin Hydro-Electric Company,* D. Minn., Fifth Div., No. 844 (1947) (plan for reorganization of Wisconsin Hydro-Electric Company, incorporated and operating in Wisconsin).

SEC was able to approve a plan in which the capital structure for the new company fully conformed to the views of the PSC.

1. Petitioner's principal reliance is upon the Holding Company Act itself, which, as the SEC has always recognized, was intended to strengthen State regulation of operating companies and, accordingly, contemplates the exercise of concurrent jurisdiction by State regulatory authorities over various transactions which the Act subjects to the scrutiny of the SEC. Examples of the provisions of the Act which contemplate such concurrent jurisdiction are those concerning new securities issues (Sec. 6, 7), acquisitions of securities or other assets (Sec. 9, 10), regulation of service company relationships (Sec. 13), and regulation of accounting practices (Sec. 15, 20). In these sections, generally, the Holding Company Act imposes restraints upon the holding company managements to prevent the recurrence of the financial malpractices which had been revealed in the investigations antedating the Act and which are referred to in Section 1. The Congress, in imposing these purely negative restraints, has made it clear that it was generally consistent with this objective to permit in addition such restraints as might be imposed in furtherance of State policies. As the court below noted with reference to Section 7, "no purpose of the Act will be thwarted, if a 'declaration' fails" (R. 397).

Section 11, in contrast to the foregoing sections of the Act, evidences an affirmative Federal policy, stated in subsection (b), that it "shall be the duty of the Commission, as soon as practicable . . . to require by order . . ." action on the part of registered holding companies and their subsidiaries to conform to standards for the simplification of their properties and structures and to bring about a fair and equitable distribution of voting power among their security holders. Appendix, *infra*, pp. 20-21. This affirmative mandate is subject to no qualification as to conformity to State law. As the court below noted, "it becomes to the highest degree unlikely that Congress should have set up a system of dual control over the fulfillment of this purpose" (R. 396). *Cf. First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U. S. 152. The intention of Congress in this respect need not be left to inference, since Section 21 expressly provides for saving the existing jurisdiction of State regulatory authorities only "insofar as such jurisdiction does not conflict with any provision of this title or any rule, regulation, or order thereunder," and the legislative history shows that this qualification was adopted with specific reference to Section 11.[9]

---

[9] In the bill adopted initially by the Senate (S. 2796, 74th Cong., 1st Sess.), Section 21, in addition to its present language, had appended to it the following additional sentence: "Nothing in this title shall exempt any public-utility company from obedience to the law of any State in which it operates." This sentence was omitted from the draft of the bill reported to the House of Representatives

2. Petitioner relies largely upon prior SEC decisions to support its argument that plans of reorganization to effectuate compliance with Section 11 are subject to the limitation contained in Section 7 (g) (Appendix, *infra,* p. 20) insofar as new securities are to be issued under a plan (Pet. 20). The precedents relied on contain no suggestion, however, that the SEC considers its duty to bring about compliance with Section 11 to be subject to the veto power of State authorities. The precedents do show that the SEC has considered, in the light of the standards for financial soundness prescribed in subsections (c), (d) and (e) of Section 7, the appropriateness of the financial structure to emerge from a reorganization. *Cf. American Power & Light Company* v. *Securities and Exchange Commission,* 329 U. S. 90, 104-05, indicating that the standards of Section 11(b)(2) derive "meaningful content," *inter alia,* from "the standards for new security issues set forth in § 7." In the case of operating companies, it has also been the practice of the SEC, as was done in this case, to insist that the accounts and financial structure of

---

on June 24, 1935. The report of the House Committee on Interstate and Foreign Commerce explained the omission as follows (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 7):

> Section 21 is changed by omitting the sentence providing that "Nothing in this title shall exempt any public-utility company from obedience to the law of any State in which it operates," on the theory that it imposed a limitation which might interfere with the carrying out of the provisions of section 11 or other sections, under which it might be necessary to do things not permitted under State law.

the reorganized company conform to any ascertainable views of State regulatory authorities, no situation having arisen where such conformity appeared to conflict with carrying out the objectives of the Federal statute.[10]

Reconciling these precedents with the decision below involves holding, as the court below did, merely that the standards of Section 7 are not "absolute limitations upon the powers of the Commission, when dealing with a plan submitted under Section 11(e)", but are merely "admonitory" (R. 398). If, however, Section 7 be deemed fully applicable to the securities issued under the Plan, we believe the mandate of Section 7(g) for compliance with "State laws applicable to the act in question" has reference only to valid requirements under State law concerning matters as to which the Holding Company Act has not prescribed a Federal standard which by its nature completely occupies the field. As we note in the next section, the present case presents an irreconcilable conflict between the views of the PSC and the Federal standard of what is "fair and equitable."

---

[10] See the published record of the proceedings of the National Association of Railroad and Utilities Commissioners for 1945, at p. 74 *et seq.* stating, among other things:

> It is the established policy of the Securities and Exchange Commission to foster effective cooperation with the state commissions in all matters where their respective jurisdictions complement each other, and in all additional matters where such cooperation is desirable and appropriate in the case under consideration.

3. Petitioner urges that "there is no irreconcilable conflict between the Federal and State statutory schemes which would warrant the conclusion that the State requirements had been superseded by paramount Federal law" (Pet. 22). In making this argument, petitioner points to the fact that there has been agreement between the SEC and PSC as to the new capitalization and agreement also that the present distribution of voting power is not fair and equitable. It notes that the sole difference between the two commissions is whether existing common stockholders are to receive 7½% of the new common stock or none at all. It is then suggested that the objective of Section 11(b)(2), the correction of inequitable distribution of voting power, could be achieved by letting the PSC have the "final say" concerning the allocation of new common stock (Pet. 23). But the petitioner does not deny that the present reorganization is "for the purpose of fairly and equitably distributing voting power among the security holders", nor has it challenged the unbroken line of authorities holding that the appropriate approach to such a problem is not a mere paper reshuffling of voting rights under the existing structure, but the bringing about of a sound recapitalization vesting voting control in securities which will represent a real equity in a properly balanced capital structure.[11] Once it is

[11] *In re Laclede Gas Light Company*, 57 F. Supp. 997 (E.D. Mo.) affirmed *sub nom. Massachusetts Mutual Life Ins. Co.* v. *SEC*, 151 F. 2d 424 (C.C.A. 8), certiorari denied, 327 U. S. 795; *In re*

recognized that the plan falls within the scope of Section 11 (e), there is no room for doubt that the Holding Company Act requires a federal determination, by the SEC and the enforcement court, of whether the proposed allocation is "fair and equitable." This Court has recently found that Federal control over the terms of a railroad merger leaves no room—even where the Interstate Commerce Commission finds no conflict with basic Federal policy—for the resolution, by reference to State law, of issues relating to the rights of security holders. See *Schwabacher* v. *United States,* No. 258, October Term, 1947.

4. In urging that the plan is "neither fair and equitable, nor feasible" (Pet. 25) the petition scarcely goes beyond mere assertion. As to feasibility, there appears to be merely a reassertion of the alleged veto power of the PSC.[12] If we look to

---

United Gas Corp., 58 F. Supp. 501, 509 (D. Del.), affirmed, 162 F. 2d 409 (C.C.A. 3); *In re Jacksonville Gas Company,* 46 F. Supp. 852 (S. D. Fla.); *Southern Colorado Power Co.,* Holding Company Act Release No. 4501 (1944), plan enforced without opinion, D. C. Colo., affirmed *sub. nom. Disman* v. *SEC,* 147 F. 2d 679 (C.C.A. 10), certiorari denied, 325 U. S. 863; *Puget Sound Power and Light Co.,* Holding Company Act Release No. 4255 (1943), plan enforced without opinion (D. Mass.).

[12] In answer to the petitioner's contention that the district court did not have the power to disregard the "condition" that the plan should be submitted to the PSC for its approval, the court below said that "a submission to that commission was not part of the plan at all; but, as it [the plan] itself declared, only one of the 'steps to be taken to make the amended plan effective'" (R. 396). Since, as the court below held, and as we have shown, the consent of the PSC is not essential to the effectiveness of the plan, the plan could be approved without submission to that body.

the opinion of the PSC for elaboration of the argument concerning what is "fair and equitable", it appears that apart from disagreement with the SEC's forecast of future earnings, the views of the PSC rest upon a rejection of reorganization criteria which have been definitely settled by this Court. Thus the PSC has attributed primary significance to adjusted book values rather than earning power, and has measured the claims of the preferred stockholders by reference to their liquidation preference (R. 279-280). By contrast, the decisions of this Court emphasize the primary importance of prospective earnings, rather than book assets, in determining whether treatment accorded in a plan is the equitable equivalent of the rights surrendered.[13] This Court has further held that a Section 11(e) reorganization of a solvent company does not mature liquidation rights of preferred stockholders.[14] The SEC did not oppose the petition for a writ of certiorari in the *Otis* case because of the then novelty of the issue. But it sees no need for now reexamining the merits of that decision, especially in the present context of a mere recapitalization in which there is not even in form a liquidation of the corporation. Thus there is not

---

[13] *Group of Institutional Investors* v. *Ch., M., St. P. & P. RR. Co.*, 318 U. S. 523, 539-541; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 525-526; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448; *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495.

[14] *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624; cf. *Schwabacher* v. *United States*, No. 258, October Term, 1947.

here present what appears to have been the most troublesome question presented in the *Otis* case: whether the charter liquidation preference should be deemed the sole measure of the rights surrendered in a reorganization which takes the form of a liquidation.

5. Petitioner's constitutional point is a challenge, albeit not a vigorous one (Pet. 24), to the Federal power to impose uniform standards of fairness with respect to the impact of what is done in furtherance of the commerce power to security holders residing in twenty-eight States and three foreign countries (R. 374). Judge Learned Hand, writing for the Circuit Court of Appeals, found this issue "too trivial to justify discussion" (R. 399).

It is said that the Federal Government cannot, through enforced recapitalizations, require "fundamental changes in the corporate charters granted by the State" (Pet. 24); the only case cited to this effect[15] contained an express statement that nothing was being decided therein respecting the powers of Congress to regulate interstate commerce.[16] It may be noted that the Court of Appeals of the State of New York and the petitioner in a prior case have taken the opposite view.[17]

---

[15] *Hopkins Federal Savings & Loan Association* v. *Cleary*, 296 U. S. 315.

[16] 296 U. S. at 343.

[17] The New York Court of Appeals has squarely held that, when the issuance of securities by a New York corporation has been ap-

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
Solicitor.

SIDNEY H. WILLNER,
Associate Solicitor.

HARRY SLATER,
Chief Counsel, Division of Public Utilities.

SOLOMON FREEDMAN,

ALFRED HILL,
Attorneys
Securities and Exchange Commission.

MAY, 1948.

---

proved by the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act, the approval of the PSC as required by the New York statute is to be dispensed with. *People* v. *New York C. R. Co.*, 233 N. Y. 679, 135 N. E. 967, affirming, 199 App. Div. 949, 191 N. Y. Supp. 944. The holding of the New York Court of Appeals in the above-cited case was followed by the PSC in 1943 when it stated that it had no alternative but to indorse its approval on the certificate of incorporation pursuant to Section 38 of the New York Stock Corporation Law in connection with the merger of Postal Telegraph, Inc., and Western Union Telegraph Company, where the issuance of securities involved in the merger had already been approved by the Federal Communications Commission. *In re Western Union Telegraph Co.*, 51 P. U. R. (N. S. 1944) 404, 410-412.

APPENDIX

The pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79a, *et seq.* are as follows:

> Sec. 7(g). If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 6, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.
>
> Sec. 11(b). It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> * * *
>
> (2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Com-

mission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

Sec. 11(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the as-

sets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

Sec. 11(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action

by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provision of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

U. S. GOVERNMENT PRINTING OFFICE: 1949